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1996

# Broderick v. Broderick : Brief of Appellee

Utah Court of Appeals

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### Recommended Citation

Brief of Appellee, *Broderick v. Broderick*, No. 960775 (Utah Court of Appeals, 1996).

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COURT OF APPEALS  
BRIEF

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IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

.A10  
DOCKET NO. 960775-CA

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ELAINE D. BRODERICK,	:	
Plaintiff-Appellee,	:	Case No. 960775-CA
vs.	:	Oral Argument
	:	Priority 15
BOYD E. BRODERICK,	:	
Defendant-Appellant.	:	
	:	
ALMA L. BRODERICK and	:	
SEPHRONIA L. BRODERICK,	:	
Intervenors-Appellants.	:	

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BRIEF OF APPELLEE

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APPEAL FROM ORDER OF THE FOURTH JUDICIAL DISTRICT COURT  
MILLARD COUNTY, THE HONORABLE GUY R. BURNINGHAM

---

DON R. PETERSEN and  
LESLIE W. SLAUGH, for:  
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ATTORNEY FOR INTERVENORS

IN THE COURT OF APPEALS  
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## **LIST OF PARTIES**

All parties are listed on the case caption.

## TABLE OF CONTENTS

LIST OF PARTIES . . . . .	i
TABLE OF AUTHORITIES . . . . .	iii
JURISDICTION . . . . .	1
ISSUES PRESENTED . . . . .	1
DETERMINATIVE PROVISIONS . . . . .	3
STATEMENT OF THE CASE . . . . .	5
A. <u>Nature Of The Case</u> . . . . .	5
B. <u>Course Of Proceedings And Disposition Below</u> . . . . .	5
C. <u>Statement Of Facts</u> . . . . .	7
SUMMARY OF ARGUMENT . . . . .	9
ARGUMENT . . . . .	10
POINT I	
THE PROPERTY DIVISION ADJUSTED FOR THE PARTIES' PREMARITAL POSITIONS AND DID NOT CONSTITUTE AN ABUSE OF DISCRETION. . . . .	10
POINT II	
THE TRIAL COURT CONSIDERED THE STATUTORY FACTORS IN AWARDING ALIMONY. . . . .	12
POINT III	
THE AWARD OF ALL OF THE FARM AND WATER STOCK TO HUSBAND WAS NOT CLEARLY ERRONEOUS. . . . .	14
POINT IV	
THE EVIDENCE SUPPORTS THE JUDGMENT ON THE RENTAL AGREEMENT. . . . .	16
CONCLUSION . . . . .	17

## TABLE OF AUTHORITIES

### Cases Cited:

<u>Allstate Enterprises, Inc. v. Heriford</u> , 772 P.2d 466 (Utah Ct. App. 1989) . . . . .	2
<u>American Rural Cellular, Inc. v. Systems Communication Corp.</u> , 318 Utah Adv. Rep. 3 (Ct. App. May 30, 1997) . . . . .	14
<u>Bown v. Loveland</u> , 678 P.2d 292 (Utah 1984) . . . . .	15
<u>Brienholt v. Brienholt</u> , 905 P.2d 877 (Utah Ct. App. 1995) . . . .	2
<u>Cal Wadsworth Const. v. City of St. George</u> , 865 P.2d 1373 (Ct. App. 1993), <u>affirmed</u> , 898 P.2d 1372 (Utah 1995) . . . . .	2
<u>Haumont v. Haumont</u> , 793 P.2d 421 (Utah Ct. App. 1990) . . . . .	10
<u>Huck v. Huck</u> , 734 P.2d 417 (Utah 1986) . . . . .	16
<u>Jackson v. Jackson</u> , 617 P.2d 338 (Utah 1980) . . . . .	15
<u>Soter's, Inc. v. Deseret Federal Savings &amp; Loan Ass'n</u> , 857 P.2d 935 (Utah 1993) . . . . .	16
<u>State v. Pena</u> , 869 P.2d 932 (Utah 1994) . . . . .	2
<u>Timpanogos Highlands, Inc. v. Harper</u> , 544 P.2d 481 (Utah 1975) . . . . .	2, 16
<u>Watson v. Watson</u> , 837 P.2d 1 (Utah Ct. App. 1992) . . . . .	1

### Statutes and Rules Cited:

Utah Code Ann. § 30-3-5(7)(h) (Supp. 1997) . . . . .	12
Utah Code Ann. § 30-3-5(7-9) (Supp. 1997) . . . . .	3, 5
Utah Code Ann. § 78-2a-3(2)(i) (1996) . . . . .	1

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SEPHRONIA L. BRODERICK,	:	
Intervenors-Appellants.	:	

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**JURISDICTION**

This is an appeal from a final decree in a domestic relations matter. Jurisdiction is conferred on this Court by Utah Code Ann. § 78-2a-3(2)(i) (1996).

**ISSUES PRESENTED**

1. Did the trial court abuse its discretion in making a property division which adjusted for the premarital debt and equity, and equally divided the marital property? The trial court's adjustment of the parties' property interests is reviewed for abuse of discretion. Watson v. Watson, 837 P.2d 1, 5 (Utah Ct. App. 1992) (citation omitted).

2. Did the trial court abuse its discretion in awarding wife a nominal amount of permanent alimony, where the evidence showed she was unable to work or to support herself, and the husband was awarded the parties' income producing assets? The trial court's

award of alimony is reviewed for abuse of discretion. Brienholt v. Brienholt, 905 P.2d 877, 879 (Utah Ct. App. 1995).

3. Did the trial court abuse its discretion in awarding the farm property and water shares to Husband, where there was competent evidence presented at trial to support the award. Wife does not challenge Intervenors' statement that the standard of review is abuse of discretion.

4. Was the finding that Intervenors were bound by a rental agreement clearly erroneous, where evidence of the agreement and debt was admitted without objection? Contrary to Intervenors' assertion, this issue is not reviewed for correctness. "The issue of whether a contract exists may present both questions of law and fact, depending on the nature of the claims raised." Cal Wadsworth Const. v. City of St. George, 865 P.2d 1373, 1375 (Ct. App. 1993), affirmed, 898 P.2d 1372 (Utah 1995). The issue here was whether the parties intended the contract to be binding. Such matters are factual, and the trial court's finding should be affirmed unless clearly erroneous. Allstate Enterprises, Inc. v. Heriford, 772 P.2d 466, 468 (Utah Ct. App. 1989). The correctness of the trial court's implied finding that the contract was not abandoned should also be affirmed unless clearly erroneous. Timpanogos Highlands, Inc. v. Harper, 544 P.2d 481, 484-85 (Utah 1975). This case also presents an issue as to whether the parties abandoned the contract. This issue is reviewed for abuse of discretion. State v. Pena, 869 P.2d 932, 938 (Utah 1994).



#### DETERMINATIVE PROVISIONS

Utah Code Ann. § 30-3-5(7-9) (Supp. 1997) states:

- (7) (a) The court shall consider at least the following factors in determining alimony:
  - (i) the financial condition and needs of the recipient spouse;
  - (ii) the recipient's earning capacity or ability to produce income;
  - (iii) the ability of the payor spouse to provide support; and
  - (iv) the length of the marriage.
- (b) The court may consider the fault of the parties in determining alimony.
- (c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.
- (d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.
- (e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

- (f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.
  - (g)
    - (i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.
    - (ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.
    - (iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this subsection.
      - (A) The court may consider the subsequent spouse's financial ability to share living expenses.
      - (B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.
  - (h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.
- (8) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates

upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

- (9) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

#### **STATEMENT OF THE CASE**

A. Nature Of The Case. This is an appeal from a property division in a divorce case. The intervenors joined to protect their claims to land and water stock used by the couple.

B. Course Of Proceedings And Disposition Below. Elaine Broderick ("Wife") filed her complaint for divorce on September 14, 1994. (R. 3-1.)<sup>1</sup> Boyd E. Broderick ("Husband") answered on October 5, 1994. (R. 8-7.) On February 28, 1995, Alma L. Broderick and Sephronia L. Broderick ("Intervenors"), who are Husband's parents, sought to intervene to protect their claimed interest in certain assets used by Husband and Wife. (R. 24.) Wife (R. 39) and Husband (R. 43) each stipulated to the intervention, and the motion was granted May 15, 1995. (R. 55.)

The Intervenors filed a complaint in intervention. (R. 53-52.) Husband answered and essentially admitted the Intervenors'

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<sup>1</sup> The documents are assembled in the record in reverse chronological order, and as a result the numbering added by the clerk in preparation for appeal is in reverse order on each document.

allegations. (R. 51-50.) Wife answered and denied most of the intervenors' allegations. (R. 47-45, 62-60.)

The matter was tried to the court on October 13, 1995. (R. 75-73.) Husband did not contest the granting of the divorce, and the parties stipulated to the division of most items of personal property. (R. 227-28, 241-43, 282, 301-02, 347.) The parties presented evidence concerning the farm and water stock, certain residences owned by the parties, and debts related to the farm.

On January 17, 1996, the court issued its memorandum decision awarding the farm to Husband, the Sutherland home to Wife, denying any credit for a premarital tax debt of Husband's which was paid by Wife, denying any alimony, and denying Wife any recovery on a claimed rental agreement against Intervenors. (R. 84-76.) The formal Decree of Divorce (R. 96-94) and the Findings of Fact and Conclusions of Law (R. 93-85) were entered February 28, 1996.

On February 29, 1996, Wife served a Motion to Amend Findings of Fact and Conclusions of Law and Decree of Divorce. (R. 101-97.) On October 13, 1996, the trial court granted the motion and ordered the decree amended to provide that the parties should retain their separate property and debts brought into the marriage, consisting of \$51,000.00 of equity Wife brought into the marriage and \$20,256.72 of debt which Husband contributed. The court also awarded Wife judgment against Intervenors for rental payments, awarded Wife alimony of \$175.00 per month, and made other minor adjustments. (R. 147-44.) An Amended Decree of Divorce (R. 170-

165) and Amended Findings of Fact and Conclusions of Law (R. 164-152) were entered on November 1, 1996.

On November 27, 1996, both Husband (R. 178-177) and Intervenor (R. 181-180) filed notices of appeal. On January 28, 1997, Husband also filed a Motion for Relief Under Rule 60(b)(1) and Rule 62(b) U.R.C.P. (Document appears in the record but has not been given index numbers.) The motion was denied following a hearing on June 17, 1997. (Minute entry appears in the record but has not been assigned an index number.)

C. Statement Of Facts. Husband and Wife were married October 24, 1987. (R. 201.) At the time of the marriage, Wife was working and making \$13.00 per hour (R. 296), had money in the bank (R. 295, 335) and had \$51,000.00 equity in her home. (R. 163, ¶ 6.) Husband was working and making approximately \$14.00 per hour (R. 296), but owed approximately \$20,000.00 to the Internal Revenue Service. (R. 270.)

After the marriage, the parties lived in Wife's home in Southgate, California. (R. 203.) They refinanced the home in December, 1987, to obtain money to pay Husband's IRS debt. (R. 204.)

The parties experienced several separations during the marriage. The initial separation was in 1990. Their final separation was in June, 1994. (R. 204.)

The parties purchased several properties during their marriage. In September, 1988, they purchased a home in Delta,

Utah, from Intervenor. (R. 216, Exhibit 4.) In March, 1990, they purchased a 70-acre farm in Millard County. (R. 219, Exhibit 5.) In connection with the purchase of the farm, they also purchased 62 shares of Melville water stock and 30 shares of Deseret water stock. (R. 223, Exhibit 7.) Finally, in June, 1993, they purchased a small home in Sutherland, Utah. (R. 221, Exhibit 6.) An additional two shares of Deseret water stock were purchased as part of the Sutherland home. (R. 157, ¶ 27.)

Wife's health started to fail in 1990. She continued to work for a time, but in November, 1992, stopped working and went on disability. (R. 215.) At the time of trial, Wife was 51 years old and was under a doctor's care for high blood pressure, pituitary gland tumor, depression, asthma and sleep apnea. She previously had a stroke. She was taking seven different types of medications. (R. 202.) Wife lived with her parents and received food and clothing worth more than \$150.00 to \$200.00 per month from them. (R. 203, 213, 256.) Because of her poor health, Wife tired very easily and was easily depressed and was mentally not responsible for her actions. (R. 255.) Wife's mother had therefore been appointed by Social Security to manage all of Wife's finances. (R. 202, 254-55.)

Husband was in good health at the time of the divorce. (R. 203.) He asserted that he had attempted to find work but had been unsuccessful. (R. 280.) At the time of the divorce, he worked once a week at a livestock auction, making \$25.00 each time. (R.

267.) He also worked on the farm. His testimony concerning the profitability of the farm was confusing, but he claimed to be making \$9,000.00 per year. (R. 262-63, 288.) He also receives about \$250.00 per month from a rental home which he inherited. (R. 248, 276.) The trial court found that he was able-bodied and imputed income of \$736.67 per month to him.

#### **SUMMARY OF ARGUMENT**

Wife's contribution to the marriage included \$51,000 of equity in her home. Husband's contribution was over \$20,000 of debt. It was proper for the trial court to adjust for these premarital contributions. The property division is approximately equal after the premarital contributions are considered, and does not show an abuse of discretion.

Permanent alimony was justified. Wife was seriously ill and unable to obtain employment. Husband was able bodied and was awarded income producing assets. The alimony award was supported by the necessary findings and within the court's discretion.

Intervenors have not shown that the award of the farm and water stock to Husband was clearly erroneous. There is evidence to support the finding that the farm was owned by the parties. Even if Intervenors' names were on the farm title, the evidence showed that was only to assist the parties in obtaining a loan and was not intended to pass title.

The judgment to Wife on the rental agreement was supported by competent evidence. The judgment of the trial court should be affirmed in all respects.

## **ARGUMENT**

### **POINT I**

#### **THE PROPERTY DIVISION ADJUSTED FOR THE PARTIES' PREMARITAL POSITIONS AND DID NOT CONSTITUTE AN ABUSE OF DISCRETION.**

The trial court awarded Wife the Sutherland home, which was not subject to any liens,<sup>2</sup> and awarded to Husband the farm and the associated water stock, which was income producing property. (R. 262-63, 281, 285.) Husband now challenges that division, claiming that it results in a total value to Wife of \$70,587.00 as contrasted to a negative \$509.00 to Husband. (Husband's brief, pp. 7-8.) This argument is misleading because it ignores the parties' premarital positions.

"As a general rule, equity requires that each party retain the separate property he or she brought into the marriage." Haumont v. Haumont, 793 P.2d 421, 424 (Utah Ct. App. 1990). The trial court found, and Husband has not challenged that finding, that Wife came into the marriage with \$51,000.00 of equity in the Southgate home, plus a substantial amount of money in the bank. Husband's

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<sup>2</sup> The parties did borrow money to purchase the home, but the loan was secured by water stock used on the farm and not by the home. (R. 210.)



premarital position, in contrast, was a \$20,256.72 debt to the IRS. The trial court expressly acknowledged the rule that the parties should retain their separate property and debts brought into the marriage and made a property settlement which adjusted for that. (R. 146.) When the summary from page 8 of Husband's brief is adjusted for the premarital positions, it reveals that the trial court equally divided the parties' marital property. Subtracting Wife's premarital equity from the net property award described on page 8 of Husband's brief yields a net property award of \$19,587.00. Adjusting for Husband's premarital debt, by adding that debt to his award, yields a net property division of \$19,747.72 to Husband, which is more than that awarded to Wife.

The property division must also be considered in light of the fact that Husband was healthy and able to work, and was awarded the parties' only income producing asset. Wife was disabled and dependent upon disability income and charity from her parents. The division of the parties' property was well within the trial court's discretion.

Husband also claims the property division is not supported by the court's findings. There is no question that paragraphs 22 and 23 of the findings contain a misstatement of fact, and that the misstatement does not support the court's conclusion. A review of the procedural history of the case, however, demonstrates that the error is clerical only. The court's initial decision following trial did not adjust for the parties' premarital position. The

court equally divided the parties' existing assets. Paragraphs 22 and 23 of the findings were prepared at that time. Wife then moved to amend the findings and the decree to adjust for the premarital positions. The trial court granted the motion and added additional findings, including paragraphs 6 and 8 of the findings. Paragraphs 22 and 23 were not modified in the final document, which was prepared by Wife's counsel. Although the error exists, it is clear from the findings what the trial court intended. When the obvious clerical error is removed from consideration, the findings fully support the trial court's conclusions.

## **POINT II**

### **THE TRIAL COURT CONSIDERED THE STATUTORY FACTORS IN AWARDING ALIMONY.**

The trial court ordered Husband, who was able-bodied and who was awarded the parties' only income producing asset, to pay alimony of \$175.00 per month to Wife, who was disabled and dependent upon public assistance. The alimony was to continue until Wife remarried, cohabited, or became otherwise not legally entitled to the alimony. (R. 168.) Husband claims that this provision violates Utah Code Ann. § 30-3-5(7)(h) (Supp. 1997), which states:

Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

The trial court complied with this statute. Paragraph 7 of the findings reflects the court's consideration of the statutory factors. The court found that Wife was disabled. The evidence showed that she was receiving state disability and also being assisted by her parents in an amount in excess of \$150.00 to \$200.00 per month. She was physically, emotionally, and mentally unable to handle her finances or support herself. Husband, in contrast, was able-bodied, had received the parties' income producing asset, and had historically earned more than Wife. The parties had been married for nine years at the time the decree was entered.

The statute does not specify exactly what "extenuating circumstances" will qualify for extension of alimony longer than the length of the marriage, and case law has not yet defined those factors. One of those factors certainly should include, however, the circumstance present here. Wife was ill, and there was no indication other than that the illness was permanent. This was not a situation where the wife would be able to return to work after receiving alimony to assist her in education and job training. Wife was permanently disabled. Wife was 51 years old at the time of trial (R. 202) and therefore 52 years old at the time the decree was entered. Continuing the alimony for only the same number of years as the marriage would have resulted in alimony terminating when Wife was approximately 61 years old. The possibility of a disabled person obtaining employment at the age of 61 years is

slim. There was no abuse of discretion in the trial court ordering that alimony continue.

### POINT III

#### THE AWARD OF ALL OF THE FARM AND WATER STOCK TO HUSBAND WAS NOT CLEARLY ERRONEOUS.

Intervenors challenged the trial court's award of all of the 70-acre farm and 30 shares of Deseret water stock to Husband. Intervenors asked the court to correct the claimed error by awarding the farm and the 30 shares of Deseret water stock equally to Husband and to Intervenors. Although this issue technically concerns only Husband, Wife addresses it because it may affect the overall equity of the property settlement.

Husband challenges the trial court's finding in paragraph 11 of the Findings of Fact, that Husband and Wife purchased the farm. In order to challenge the finding, Intervenors were required to show that the trial court's factual findings were clearly erroneous. Intervenors were required to marshall all the evidence supporting the finding and then demonstrate that the finding lacked support. American Rural Cellular, Inc. v. Systems Communication Corp., 318 Utah Adv. Rep. 3, 4 (Ct. App. May 30, 1997).

Marshalling the evidence would have revealed the following: Wife testified that she and Husband purchased the farm. (R. 219-220.) No other evidence was presented at trial concerning the status of the title to the farm. There was testimony concerning the names on the water stock (R. 315), but no similar testimony

concerning the names on the farm title. The most that parents testified was that they had a "substantial financial investment" in the farm (R. 316), and that they claimed "an interest" in the farm. (R. 318.) There was testimony that the water stock was put in the four names in connection with obtaining a loan. (R. 322, 343.) There was no corresponding evidence concerning the title on the farm. Intervenors testified concerning payments they made on the farm, but Wife disagreed with that testimony. (R. 341-342.) The evidence on which Intervenors now rely, a copy of the plat map, was simply an exhibit attached to an appraisal on the farm (Exhibit 15), and was not called to the court's attention nor offered as evidence of the title on the farm.

More importantly, even if Intervenors' names were on the title, that did not compel awarding the farm to them. There was evidence that their names were put on the water stock solely in connection with obtaining a loan, and if their names were on the land title also, it was presumably for only the same purpose. It is well established that a divorce court may distribute property among the parties regardless of the status of the title. Jackson v. Jackson, 617 P.2d 338, 340-41 (Utah 1980). Outside a divorce, courts will implement the intent of the parties notwithstanding a deed which appears absolute on its face. Bown v. Loveland, 678 P.2d 292, 297 (Utah 1984).

If Intervenors were on the deed in this case, the evidence supports the conclusion that their names were there only for the

purpose of obtaining a loan. The trial court did specifically find that the Intervenor's contributions to the farm and water stock were minimal compared with the value, and found that giving the Intervenor an interest in just the water stock still resulted in a significant windfall to them. (R. 159, ¶ 20.) Intervenor has not challenged this finding, and it is amply supported by the evidence. The decision of the trial court awarding the farm to Husband should be affirmed.

#### POINT IV

##### THE EVIDENCE SUPPORTS THE JUDGMENT ON THE RENTAL AGREEMENT.

Wife testified that Alma Broderick, one of the Intervenor's, signed a rental agreement in favor of Husband regarding the Delta home. (R. 211, 333-335.) It was undisputed that Intervenor had not paid the rent required by the agreement. Because the Delta home was owned by Husband and Wife jointly, the rent owed on that home was part of the marital property and subject to division by the court. See Huck v. Huck, 734 P.2d 417, 420 (Utah 1986) (court has power to divide property regardless of how titled).

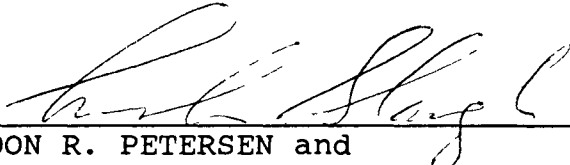
Intervenor now claim the rental agreement was abandoned. Abandonment must be shown by clear and unequivocal evidence, and requires proof of an intentional relinquishment of one's rights in the contract. Timpanogos Highlands, Inc. v. Harper, 544 P.2d 481, 484 (Utah 1975). Accord Soter's, Inc. v. Deseret Federal Savings & Loan Ass'n, 857 P.2d 935, 942 (Utah 1993) (proof of waiver must

be distinct). This court should also consider that the parties to the contract are presumed to be have intended what the contract said. Allen v. Bissinger & Co., 62 Utah 226, 219 P. 539, 541-42 (1923) (The law "judges of his intentions by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind upon the subject.") (citation omitted). This court should presume that the parties did not intentionally enter into an agreement which was a nullity. The trial court found the contract was validly entered, and that the debt remained unpaid. The evidence supports these findings, and the judgment should be affirmed.

#### CONCLUSION

The trial court carefully considered the evidence and reach a property division which adjusts for the parties' premarital positions and is fair and equitable. Appellants have not shown that the trial court's findings were clearly erroneous, or that the trial court abused its discretion. This Court should affirm.

DATED this 26 day of August, 1997.

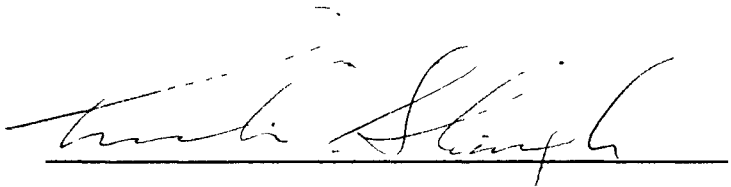
  
\_\_\_\_\_  
DON R. PETERSEN and  
LESLIE W. SLAUGH, for:  
HOWARD, LEWIS & PETERSEN  
Attorneys for Plaintiff-Appellee

**MAILING CERTIFICATE**

I hereby certify that two true and correct copies of the foregoing were mailed to each of the following, postage prepaid, this 26<sup>th</sup> day of August, 1997.

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A handwritten signature in cursive script, appearing to read "Mark Stangh", is written over a horizontal line.

J \LWS\BROD BRF